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PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

Report of the Secretary General

SUMMARY

The present report has been prepared in response to Economic and Social Council resolution 1989/10. It discusses salient developments in the exercise of permanent sovereignty over natural resources; reviews developments and trends, particularly with respect to the investment policies pursued by Governments in the exercise of permanent sovereignty and with respect to environmental considerations taken into account by Governments in furthering the implementation of the principle of permanent sovereignty; and describes the technical cooperation activities of the Department of Technical Cooperation for Development and the United Nations Centre on Transnational Corporations in support of Governments in the exercise of permanent sovereignty over natural resources.

* E/C.7/1991/1.

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CONTENTS

	Paragraphs	Page
INTRODUCTION	1 - 5	3
I. INVESTMENT POLICIES	6 - 22	4
A. Investment policies in the mineral and energy sectors and the exercise of permanent sovereignty	6 - 12	4
B. Measures to encourage mineral investment	13 - 16	5
C. Investment policies for energy resources	17 - 22	5
II. RECENT DEVELOPMENTS IN LEGISLATION AND REGULATION	23 - 31	7
A. Legal framework for petroleum and mineral investment	23 - 24	7
B. Mining legislation	25 - 28	7
C. Petroleum legislation	29 - 31	8
III. CONTRACTS AND NEGOTIATIONS: MINING AGREEMENTS	32 - 38	9
IV. INTERNATIONAL COOPERATION ARRANGEMENTS RELATED TO THE EXERCISE OF PERMANENT SOVEREIGNTY	39 - 43	10
V. ENVIRONMENTAL CONSIDERATIONS	44 - 52	12
A. Social and environmental considerations in mining legislation	45 - 48	12
B. Environmental considerations in petroleum legislation	49	14
C. International cooperation	50 - 52	14
VI. WATER AND THE EXERCISE OF PERMANENT SOVEREIGNTY	53 - 54	15
VII. TECHNICAL COOPERATION	55 - 64	15

INTRODUCTION

1. Since the adoption by the General Assembly of resolutions 523 (VI) of 12 January 1952, 626 (VII) of 21 December 1952, 1803 (XVIII) of 14 December 1962 and 3201 (S-VI) and 3202 (S-VI) of 1 May 1974, the Economic and Social Council and the Committee on Natural Resources have monitored developments in the exercise of permanent sovereignty over natural resources. At its eleventh session, in 1989, the Committee, in discussing the principle of permanent sovereignty, emphasized the implications of changing investment policies, environmental issues, the question of state enterprise restructuring and the scarcity of financial resources for investment.

2. The principle of permanent sovereignty over natural resources, formulated in 1952, reflected the General Assembly's concern with the economic development of developing countries. The Assembly enunciated the right of developing countries to determine freely the use of their natural resources and proclaimed it as a right inherent in sovereignty. Consequently, at its origin the concept developed as part of the right of peoples to self-determination. Thereafter the concept was embodied in a legal instrument, namely the International Covenants on Human Rights, in article 1 of which it is asserted that in no case may a people be deprived of its own means of subsistence on the grounds of any rights that may be claimed by other States. In 1974, in the context of the Declaration and the Programme of Action on the Establishment of a New International Economic Order (General Assembly resolutions 3201 (S-VI) and 3202 (S-VI)), the concept of permanent sovereignty over natural resources was acknowledged as a principle of international law and subsequently as an authoritative affirmation of the inalienable right of States to exercise sovereignty over their natural resources. In those resolutions, the scope of permanent sovereignty was extended to cover not only natural resources but also all wealth and economic activities.

3. Since its emergence, the concept has been invoked by developing countries in the context of nationalization, or forced renegotiation of contractual terms, in particular during the period of transition from colonial to independent state. It has also been invoked in precluding foreign investors from operating or owning particular sectors of the economy.

4. More recently, after consolidation of the notion of economic sovereignty, which emphasized the development of the concept, and following the economic developments of the early 1980s, the exercise of the right to permanent sovereignty has focused on means to attract foreign investment.

5. Consequently, the present report briefly reviews the modalities for and trends in the exercise of permanent sovereignty as reflected in investment policies (legislation, regulations, contracts, international cooperation). In view of General Assembly resolutions 44/228 on the United Nations Conference on Environment and Development and 44/229 on international cooperation in the field of environment, the report examines recent trends in the exercise of permanent sovereignty relating to environmental protection and sustainable development. In view of the interest expressed by representatives at the Committee's eleventh session, the report includes a section on United Nations technical cooperation in this area.

I. INVESTMENT POLICIES

A. Investment policies in the mineral and energy sectors and the exercise of permanent sovereignty

6. The investment policies of countries constitute the core of the exercise of permanent sovereignty by Governments. Typically, they are an expression of the Government's priorities with regard to the origin of investment (public/private, foreign/national), the modality for the investment (contracts), and the legal framework for investment (e.g., legislation and regulation in the field of mining, petroleum and energy law, environmental law, tax and investment law).

7. Although these investment policies are an expression of permanent sovereignty, and hence adopted completely at the discretion of Governments, they need to be considered in the light of the interests, attitudes and strategies of national and international companies particularly when national policy encourages private investment.

8. The situation of mineral investment is highly unsatisfactory in most developing countries. Despite geological exploration that is often very promising, investment in both exploration and mine development is far below what it could be. Studies conducted by the World Bank and the East-West Center examine why mining companies do not invest to a greater extent in developing countries, particularly in Africa. The results indicate that most mining companies consider the geological endowment of a significant number of major developing countries comparable or even superior to their traditional investment targets. The reasons for investment reluctance are inadequate investment conditions, lack of information and political instability.

9. In addition, in a number of developing countries, investment capital is available in theory. However, the capital markets are insufficiently developed for financing the high-risk phase of exploration and the high-cost phase of mine development.

10. Past experience with investment promotion shows that it usually takes a considerable time to adapt the legal, fiscal, contractual and investment regime to the specific requirements of international mining investment. After such reform is completed, it is necessary to carry out vigorous investment promotion campaigns using mining industry journals, films, news releases and specific promotional meetings. Such promotion can only be carried out once adequate information is available, the legal regime satisfactory and the Government has set up an effective mechanism for mineral licensing and contract negotiations.

11. A study sponsored by the World Bank has noted that developing countries reinvest a much smaller percentage of mining revenues in mineral exploration than do developed countries where such exploration is pursued by private corporations. For example, in one developing country, the Government obtains 60 per cent of its total revenues from the mining sector, but reinvests less than 1 per cent, while mining companies usually reinvest about 5-10 per cent of their gross revenues back into exploration. Accordingly, proposals have been made to establish national

mineral development funds fed by a percentage of mining income (e.g., a part of the royalty usually collected by the Government) in order to fund training, maintenance of government mining services and mineral exploration and maintenance of the reserve base of the country otherwise subject to continuous depletion by production. This system is to some extent followed when State oil companies are allowed to invest part of the income from petroleum contractors in strengthening their own technical capabilities, including seismic surveys and drilling.

12. The Committee may wish to discuss the potential of national mineral development funds and request a more detailed study on such mechanisms.

B. Measures to encourage mineral investment

13. Many government agencies without much previous experience in foreign investment matters face considerable difficulties in assessing what would constitute a commercially and financially viable project proposal, in reviewing investment projects submitted by companies and in evaluating the capability and credibility of an individual company. It has been observed that considerable public funds are at times invested in mining and petroleum projects with disappointing results. Hence there is a considerable need for information, training and advisory services with regard to mineral economics and the preparation and appraisal of mineral feasibility studies.

14. The Committee may wish to consider the merits of preparing detailed and practical guidelines on feasibility studies and mineral economics (mineral development policies and project appraisal) of direct concern to developing countries.

15. The Committee may also wish to consider the modalities by which the United Nations could facilitate the flow of mineral financing for viable mining projects to developing countries. A study on current methods of mining and petroleum finance, with the participation of international and national development finance institutions, could be undertaken. The Committee may also wish to consider whether a study should be undertaken of the relative effectiveness of the various methods of organizing investment promotion campaigns in the petroleum and the non-fuel mineral sector.

16. Furthermore, the Committee may consider the establishment of a database within the United Nations containing information on available mineral and petroleum investment opportunities to facilitate the investment promotion activities of interested developing countries. The United Nations Industrial Development Organization has a similar project, focusing on industrial investment opportunities.

C. Investment policies for energy resources

17. The Committee decided at its eleventh session to emphasize energy at the twelfth session, in 1991. As in the non-fuel mining industry, petroleum investment policies have been characterized by an ever-increasing emphasis on policies to

attract capital. The necessary investment in exploration and development can be carried out either by State petroleum companies or by the international oil industry. In many countries, the ability of State enterprises to mobilize the requisite finance is jeopardized by overtaxation and by an imposed obligation to supply the domestic economy below market price.

18. It is generally recognized that access to comprehensive information is an essential precondition for attracting exploration finance for activities in new areas. An interregional seminar on petroleum policy, organized jointly by the Government of Norway and the Department of Technical Cooperation for Development of the United Nations Secretariat at Oslo in September 1989, concluded that systematic resource assessment, providing prospective investors with access to critical geological and related information, was essential for successful investment promotion.

19. Coal. Considerable coal production has been developed over the past decade in China, India, Colombia, Indonesia and some other countries (Venezuela). Important coal reserves have been identified in Africa (Botswana, Mozambique, United Republic of Tanzania) and Asia (Viet Nam, Mongolia). Development of these reserves will depend on the relative merits of such deposits in terms of grade, quality, location (particularly transport costs to ports) and future demands for coal for power generation. The last-mentioned item may be influenced by environmental considerations, which tend to favour the use of low-sulphur coal.

20. Natural gas. Natural gas reserves in developing countries are estimated to be of the order of 52 trillion cubic metres. Anticipated oil prices during the mid-1990s are considered adequate to justify development of most onshore and some offshore gas reserves. Their development is also increasingly attractive on economic and environmental grounds. However, viable gas reserves are often not developed owing to the unavailability of the large capital investment usually required. Foreign investment is often hard to arrange since gas production would be mainly for domestic consumption. The World Bank has recently established a Natural Gas Development Unit.

21. Uranium. Uranium production and consumption have stagnated over the past 10 years, while uranium price averages are at a very low level, around $10 a pound. There has been limited new production and exploration activity is very low. It has been predicted that the traditional large excess of production over consumption may decline to a balanced situation within the next few years. While uranium is still closely associated with the risk of nuclear power plant failure, some observers have pointed out that nuclear energy generates less environmental damage than does fuel-based electricity in terms of normal operations. The prospects for nuclear energy will therefore depend to a large extent on the political and the public attitude to nuclear power and its competitors in terms of risk and environmental damage. The Uranium Institute estimates that new power plants will increase world-wide uranium demand by almost one third by the year 2005. Since it takes many years to explore for uranium and develop production, uranium prices could increase during the 1990s. This would lead to a renewed interest in exploring for and developing low-cost high-quality uranium reserves.

22. Environmental considerations are likely to have a much greater impact on energy fuels than in the past. While there are environmental considerations in extraction of non-energy and energy minerals, the major one is the emission of sulphur oxides, carbon oxides and nitrogen oxides at the intermediate and user stage. Future demand is likely to favour energy fuels with relatively lower environmental impact on acid rain, global warming and the ozone layer. Natural gas appears superior to other energy fuels (coal, in particular high-sulphur coal, lignite and fuel oil). Should countries start to impose special taxes on energy use reflecting environmental cost, then exploration and investment activity would place higher priority on energy fuels with less environmental impact.

II. RECENT DEVELOPMENTS IN LEGISLATION AND REGULATION

A. Legal framework for petroleum and mineral investment

23. It is recognized that the legal framework is an essential condition for petroleum and mineral investment. While the legal framework cannot substitute for geological endowment, it sets the main policies with regard to investors and State agencies, determines variables and parameters for negotiation of specific agreements, guides administrative action and thereby largely determines the commercial viability of investment conditions. Reform of the legal framework - as currently undertaken in most developing countries - is usually necessary to articulate a substantive change of investment policy; in addition, the very act of policy reform to implement a reorientation of government investment policy serves as a signal to the international business commmunity. Successful promotion strategies usually involve a systematic effort at publicizing policy and legislative changes compatible with international industry.

24. Countries in the process of economic reorientation towards a market economy and foreign investment face a particular legislative challenge. Usually, the existing legal framework does not deal satisfactorily with such matters as contracts, ownership, capital markets, environment, employment, liability, tax, investment and sector-specific law. In fact, most observations made highlight the importance of creating an adequate, specific, well-coordinated legal framework for investment as probably the most important precondition for successful reorientation towards market economies.

B. Mining legislation

25. Current mining legislation tends to reflect the need to attract investment, particularly in countries restructuring to market economies. A recent survey of successful mineral investment regimes identified Botswana, Chile, Ghana, Guinea, Indonesia and Papua New Guinea as countries with notable mineral development success. Further study is being undertaken with the objective of identifying what constitutes a condition for success or failure of investment policies.

26. The following features have been identified so far as elements of a successful mineral investment regime: political stability, consistency and coherence of the

investment conditions as illustrated by the standard use of reasonable, well-tested model agreements, guaranteed rights to the mineral title after successful discovery (including ownership), minimization of bureaucratic discretionality, elimination of legislative restriction and State mining reserves, ability to use mining titles for financing, effective processing and management of mining titles, access to international arbitration and management and equity control for the investors contributing risk capital. From an investor perspective, these conditions need to be agreed upon before intensive exploration, since companies are unwilling to commit to major exploration risk when the rules of the game are uncertain. Where a domestic capital market exists or could exist, temporary tax incentives or promotional exemption for gold investment, for example, have proved effective in stimulating mineral investment.

27. It is important that the tax and foreign exchange regime be tailored to suit the specific requirements (long-term recovery, export orientation, high exploration and price risk, capital intensity) of mining investment. These often mean a comprehensive and specific mining tax regime. In-depth discussions are therefore required with other government agencies involved (typically, the ministry of finance and the central bank).

28. Mandatory national majority requirements have been an important policy in many investment laws of the past 20 years. However, some relaxation has taken place in recent years. Experience has shown that ownership participation does not guarantee control, therefore a shift from equity participation to forms of effective control has been taking place.

C. Petroleum legislation

29. Most non-producing countries have equipped themselves with petroleum laws over the past decade, much through a World Bank petroleum exploration promotion programme. Given the volatility of the petroleum industry, such laws need review from time to time to ascertain if, in particular from a fiscal perspective, they are compatible with current market conditions. At the petroleum policy seminar organized by the Government of Norway and the Department of Technical Cooperation for Development in September 1989 (see para. 18 above), participants considered that a legal, fiscal and contractual framework that was both stable and responsive to the various ranges of geological risk, market conditions and economic viability would best encourage investment. Many developing countries still have fiscal and contractual regimes that are regressive, that is, they favour large-scale deposits while imposing a heavier, and thereby prohibitive, tax burden on smaller and marginal oilfields.

30. There are at present two main developments in petroleum legislation: first, the movement towards greater privatization and deregulation in some developing countries and, second, the new orientation in former centrally planned economies to create a modern legal framework appropriate for both attracting and effectively regulating foreign petroleum investment.

31. China, having restructured its petroleum policy in the early 1980s, has a

specific and detailed legal and contractual framework for petroleum investment. Work is under way on petroleum legislation in Albania, the Lao People's Democratic Republic, Mongolia and the USSR, among other countries.

III. CONTRACTS AND NEGOTIATIONS: MINING AGREEMENTS

32. Within the legal framework, contracts between Governments and investors are the most direct and concrete example of investment policies. The following observations draw upon some recently signed agreements which are fairly indicative of current trends.

33. In one African country, an agreement was concluded in 1987 with a major international mining company to develop a 70,000 oz per annum gold mine. The fiscal regime is characterized by a combination of income tax, royalty, free equity (triggering profit participation after investment recovery) and a government option to purchase additional equity, with credit for previous exploration expenditures. The income tax exemption originally provided under the law was replaced by accelerated write-off (over three years) of all expenditures. This feature, coupled with a royalty reduction over the first few years, accelerates recovery, thereby increasing the attractiveness of the project in financial terms and reducing the exposure to political risk.

34. In another country in Africa, the State gold mining corporation negotiated a management contract in 1985 with a consortium to rehabilitate its run-down gold mines. The agreement was based on a World Bank loan, with the loan agreement expressing a preference for a management contract. The problem with management contracts is that companies tend to maximize their profit through reimbursement of expenditures (plus large overheads); they are less interested in successful performance as measured by profit. In addition, the State company and the management contractor in this case had little interest in designing an effective and strong management structure. It is perhaps not surprising that the contract was terminated after three years and that the production targets originally agreed upon were not achieved.

35. The extent of government participation is always a controversial issue. The agreements concluded with government majority participation in another African country have generated relatively little income to the Government since it is counterbalanced by numerous add-ons for the foreign partners (marketing, management, technical assistance commissions), which leave very little profit for sharing among the partners. Since majority participation for a Government without the technical and financial ability to assume majority responsibility tends to create a disjointed and dispute-prone operational structure, there is now a noticeable trend for Governments to reduce their equity participation in resource projects. To reduce the financial exposure of a Government, contractual devices have been developed throughout the mining and petroleum industry. In coal agreements of one developing country, the government company contributes no risk capital. The contractor assumes 100 per cent of the investment risk and must offer to local investors equity participation during the production phase. Likewise, petroleum association contracts in another country provide that the investor will

assume all the exploration risk and that the state enterprise will, if it chooses to do so, participate as a contractual joint venture partner during the development phase. The experience gained over the past 15 years seems to be that it is better for the Government's financial position and for general project performance if the Government does not assume management responsibility and the country's scarce capital is kept out of a risky investment.

36. Should Governments decide to provide funding and assume management and risk on the basis of a turnkey contract, close attention must be paid to risk management. Risks relate to management (production shortfalls and delays, cost overruns), to prices (lower than expected revenues due to price declines) and to financing (unexpected increase in interest rates). Such risks cannot be diversified away completely. However, methods of prudent risk management are available, such as extensive and prolonged guarantees for production performance at prescribed costs by the contractor, repayment of debt out of production only, forward sale of metals (as implicit in gold loans), loans with a fixed interest or interest rates tied to metal prices. These approaches to risk management, have their price, however, and they require access to advanced methods of financial management and negotiation.

37. In a developing country in Latin America, a major renegotiation took place in 1988 revising the terms of a nickel project. Agreements negotiated in 1956 and 1969 had provided for almost 100 per cent debt financing; debt service was fully tax deductible and government income was almost exclusively based on profit-sharing. As a result, when nickel prices fell and production costs increased, a staggering debt burden was contracted with the main shareholders. The Government did not receive any meaningful income over a period of 20 years and had little to expect during the following decade. A unilateral levy imposed by the Government at a time of sharply rising nickel prices led to a renegotiation in 1988. The renegotiated agreement provides for a royalty based on the difference of quoted nickel prices and assumed production costs, the latter being linked to an external index.

38. In some cases, mineral deposits straddle a border or can be developed only in cooperation between two countries, one possessing the deposit, the other the only economically viable port and railroad connection. Such bilateral projects are extremely difficult to negotiate, since the usual negotiating difficulties are compounded by intergovernmental negotiations and by the problem of establishing a joint negotiating strategy between two Governments on one side and one or more parties on the investor side. One has to look for precedents in joint petroleum development and in joint development of shared waterways for power production.

IV. INTERNATIONAL COOPERATION ARRANGEMENTS RELATED TO THE EXERCISE OF PERMANENT SOVEREIGNTY

39. International cooperation arrangements for joint petroleum developments have been discussed before (E/C.7/1989/5). It is interesting to note that a joint petroleum development arrangement between the Government of Democratic Yemen and Yemen played an important role in the merger of the two countries in May 1990. There are many offshore areas where border limitation is controversial. In these

areas, Governments should be encouraged to consider the establishment of joint petroleum exploration and development agreements. Regional exploration projects (funded by the United Nations Development Programme and perhaps the World Bank) could provide a sound basis of geological information before negotiations for a joint petroleum regime are initiated.

40. The World Bank affiliated Multilateral Investment Guarantee Agency (MIGA) has started operations and is negotiating investment insurance for a number of major mining projects in developing countries. The MIGA convention is currently the major international legal instrument providing both procedural and substantive legal principles on foreign investment. Angola, Brazil, Chile, China, Colombia, Costa Rica, Ecuador, Guyana, Hungary, Uruguay and Yugoslavia have recently joined the MIGA convention. The projected code of conduct on transnational corporations, under negotiation since 1976, is being discussed by the United Nations Commission on Transnational Corporations.

41. Developing countries have traditionally had recourse to international arbitration as a means of resolving investment disputes. However, a number of countries (China, Ecuador, El Salvador, Ethiopia, Guyana, Honduras, Madagascar, Paraguay, Romania, Yugoslavia) have acceded to the World Bank-affiliated Convention on the Settlement of Investment Disputes between States and Nationals of Other States, providing for arbitration of investment disputes. Analysis of recent investment agreements indicates a trend, in particular among countries with a strong interest in attracting investment, to accept non-national arbitration (through the International Centre for Settlement of Investment Disputes (ICSID), the International Chamber of Commerce or the United Nations Commission on International Trade Law, for example) in investment agreements for oil and non-fuel minerals. In countries where such arbitration is disallowed for public entities, various forms of national arbitration or the design of procedures based on experts' decisions constituting quasi-arbitration have evolved in the search for a dispute settlement mechanism that is both impartial and acceptable to both sides. In countries engaged in the process of reorienting their economic policies towards investment promotion, there is an observable trend towards acceding to the international conventions mentioned (the ICSID convention, the MIGA convention) and towards concluding bilateral investment protection treaties.

42. The recently created East European Development Bank, whose headquarters are to be located in London, is expected to provide loans for mining projects in Eastern Europe provided there is participation by a private investor. The Inter-American Development Bank has recently created a subsidiary, the mandate of which is to promote foreign investment in Latin America by providing loan and equity finance, similar to the World Bank's subsidiary, the International Finance Corporation (IFC). IFC is already involved in co-financing numerous mining projects world wide, statutorily in association with private companies.

43. The European Community has introduced an investment promotion scheme for the Andean Pact countries. Basically, the International Investment Partners' Scheme of the Community will offer financial support of up to 50 per cent of pre-investment activities (search for opportunities, matching partners and promotional activities, feasibility study, initial financing up to 20 per cent) relating to European

Community/Andean Pact projects. Since the Community is building similar links with other groups of developing countries and is already providing support to mining projects in the Lomé group of countries, further investment promotion activities can be expected.

V. ENVIRONMENTAL CONSIDERATIONS

44. In view of the increased global awareness of environmental issues and, in particular, in the light of General Assembly resolutions 44/228 on environment and development and 44/229 on international cooperation in the field of environment, this report addresses itself to and highlights a number of issues in which environmental considerations are of particular importance in the context of the exercise by Governments of their inalienable right of permanent sovereignty over natural resources. In resolution 44/228, the Assembly, having recognized that "the global character of environmental problems, including climate change, depletion of the ozone layer, transboundary air and water pollution, the contamination of the oceans and seas and degradation of land resources ... necessitates action at all levels ... and the commitment and participation of all countries", and having affirmed that the "responsibility for containing ... global environmental damage must be borne by the countries causing such damage ... in accordance with their respective capabilities and responsibilities", reaffirmed that, "in accordance with the Charter of the United Nations and the applicable principles of international law, States have the sovereign right to exploit their own resources pursuant to their environmental policies", and also reaffirmed "their responsibility to ensure that activities within their jurisdiction ... do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction and to play their due role in preserving and protecting the global and regional environment in accordance with their capacities and specific responsibilities". In the same resolution, the General Assembly decided that the objectives of the United Nations Conference on Environment and Development (to be held in 1992) should be, inter alia, "to promote further development of international environmental law and to examine ... the feasibility of elaborating general rights and obligations of States, as appropriate, in the field of the environment, taking into account relevant existing international legal instruments". This is to be done, according to the Assembly, with a view to arriving at "specific agreements and commitments by Governments and by intergovernmental organizations for defined activities to promote a supportive international economic climate conducive to sustained and environmentally sound development in all countries". These issues will be considered by Member States in the context of the United Nations Conference on Environment and Development.

A. Social and environmental considerations in mining legislation

45. The issue of social policy and environmental protection has come to the fore both in Eastern Europe, where mining and metallurgical industries are recognized to have created considerable damage to the environment, and in developing countries. In one developing country, major mining operations were closed temporarily owing to large disposal of tailings into waterways. In a country in Latin America, the

local population has so far resisted the expansion of a large gold mine into sulphide ore mining using cyanide. In a developing country in Asia, mining in fragile high mountain areas has caused considerable concern. In another country, a large-scale mining project affects both waterways and large tracts of tropical forest. In another country, the local population burned down a costly tantalum plant financed by international investors and the International Finance Corporation (IFC). In a developing country in Africa, a large copper/gold mine has been shut down for an extensive period owing to insecurity created by the dissatisfaction of local people with the mine. At another copper/gold mine in the same country, a decision was taken by both investors and the Government to waive the obligation of a large tailing facility (saving over $US 200 million) to keep the mine in operation. As a result, the tailings are now poured into a major river. The mine itself is also affected by discontent among the people living around it. In a developing country in Latin America, an agreement with a corporation to develop a lithium deposit has been cancelled owing to persistent opposition from the province.

46. These developments demonstrate that it is both good social policy and sound economics to take account of the concerns of the local people, as well as general environmental concerns, when designing, developing and running a mining operation. Both mining companies with their predominantly engineering orientation and central Governments anxious for revenues are likely to pay increasing attention to such concerns. Early incorporation of environmental and social protection issues in the planning process can substantially reduce unavoidable costs later. Such early incorporation can also help to win the acceptance of the local people, whose collaboration is often essential to developing and operating a mining operation. Increasingly, public and private lenders and funding organizations attach "green conditionalities" (i.e., environmental impact assessment obligations) to loans. Mining projects will need strong environmental inputs (usually through environmental impact assessments) if they are to attract the necessary (equity and loan) funds.

47. The United Nations Revolving Fund for Natural Resources Exploration, in collaboration with the Department of Technical Cooperation for Development of the United Nations Secretariat and with assistance from the Government of Norway, has recently initiated a project to design environmental guidelines for mining operations. The Department is planning, together with the German Foundation for International Development, an international meeting on mining and the environment, to be held at Berlin in June 1991, and is organizing a seminar on energy and the environment, which will take place at Beijing also in June 1991.

48. A number of recent meetings dealing with mining and the environment (such as the environmental workshop organized by the European Community and the Association of South-East Asian Nations at Jakarta in 1989) have called attention to the need to develop practical guidelines, reference cases and models for environmental impact assessment of mining projects.

B. Environmental considerations in petroleum legislation

49. The main environmental impact of hydrocarbon use arises in the downstream phase, mainly in energy generation and in particular through air pollution. However, even in the exploration phase (blow-outs) and the extraction, pipeline and tanker transportation phases, oil and gas carry significant environmental risks. In the case of offshore drilling, extraction and transportation, the local environment and safety may be affected by, for example, large-scale marine and coastal oil-spill pollution. Experienced producer countries, such as Canada, Norway, the United Kingdom and the United States, have established detailed mechanisms for (in particular offshore) oil pollution and safety. These rely partly on incorporating safety and environmental standards developed by industry associations into regulations and partly on the imposition of safety objectives on companies, which are then obligated to specify such objectives through internal guidelines (Norway). Developing countries just entering large-scale petroleum production, in particular in offshore areas, for the most part had not yet have experience in establishing the requisite regulatory system and enforcement capability. Since the risks from offshore oil development are considerable and affect the international community, developing countries may require assistance in strengthening their regulatory capabilities. It has to be recognized that the regulatory approach has its limits. The official reports on major rig disasters (Sea Gem, Alexander Kjelland, Ocean Ranger) illustrate this point. The main issue seems to be to build up industry expertise with the government regulatory agency and to enlist the collaboration of the operators. It has been proved that compensation schemes designed by operators, and supervised by Government, provide compensation for damage suffered (debris, spills) faster than through administrative procedures.

C. International cooperation

50. At the international level, there are a number of conventions concerning prevention of pollution of the seas, including the 1982 United Nations Convention on the Law of the Sea, which contains important provisions with respect to offshore petroleum activities and the prevention of marine pollution. Several United Nations organizations have been involved in developing other conventions and regulatory guidelines, namely the International Maritime Organization (IMO), which deals mainly with guidelines for operations and removal of offshore drilling units and related installations, and the International Labour Organisation (ILO), which is mainly concerned with safety issues.

51. There seems to be a considerable need to help coastal States having limited jurisdiction over installations on their continental shelf to develop and enforce environmental and safety rules and formulate uniform guidelines and standards applicable to offshore oil development in the interest of both coastal States and global environmental concerns. Regulation of oil rigs, provision of environmental impact statements and continuous monitoring by well-trained supervisory agencies of offshore oil operations are required.

52. The Committee may wish to consider how, with the collaboration of the

Department of Technical Cooperation for Development, UNEP, IMO and other organizations concerned, guidelines could be prepared on petroleum safety and environmental protection, in particular covering offshore oil operations.

VI. WATER AND THE EXERCISE OF PERMANENT SOVEREIGNTY

53. Special issues of water development and use and permanent sovereignty have been discussed in previous reports submitted to the Committee. National sovereignty has usually to be balanced against international obligations in the case of international rivers and the integrated development of international water basins. There have been numerous instances of international cooperation, particular concerning river basin development, joint projects for power generation from rivers shared by several riparian countries and international waterways. Given the growth in the consumption of water, which to some extent parallels economic growth and the limitation on water resources in many countries, important questions have arisen concerning the duty to cooperate in the development and utilization of water, consultations and joint management of international rivers and water basins.

54. The Committee may wish to consider if a report should be prepared on the legal, institutional and environmental issues of the exercise of permanent sovereignty with respect to water.

VII. TECHNICAL COOPERATION

55. The Department of Technical Cooperation for Development provides legal and investment advisory services, at the request of Governments, in support of the exercise by Governments of their inalienable right of permanent sovereignty over natural resources. In the light of recent trends, it is expected that the demand for the legal, investment and environmental regulation advisory services provided by the Department is bound to grow substantially.

56. Currently, the Department, based on its mandate for assisting Governments in the exploration, development and management of natural resources and energy, provides advisory services on policy and planning, on legislation and taxation, on contract negotiation and contract auditing and management, on investment promotion and financing, on State enterprise restructuring and privatization and on offshore resource development in petroleum, gas, non-fuel mineral and energy development. The characteristic feature of those advisory services is the interdisciplinary approach taken, bringing together strong in-house geological, engineering, economic, financial and legal expertise. Close relations are maintained with Governments, industry and financial institutions.

57. Direct advisory services are complemented by a series of seminars which bring together leading experts, representatives of international companies and developing countries. Seminars have been held on (a) mining legislation, (b) negotiating mineral and petroleum agreements with computerized methods of financial analysis, (c) the international gold industry, (d) mineral development in West Africa,

(e) privatization and joint venture negotiations in Brazil, (f) restructuring State mining enterprises and (g) the prospects for the mining industry in developing countries to the year 2000. Future seminars are envisaged on mining and the environment, energy and the environment, mineral taxation and State petroleum companies.

58. In response to the increasing demand for expertise on investment matters, the World Bank has recently set up two investment advisory services: the Foreign Investment Advisory Service (FIAS), a MIGA/IFC joint venture, provides advice on investment policy and legislation; and the Private Sector Development Group within the Bank's Legal Department is developing an advisory services capability to help to create a legal framework (company, contracts, commercial, investment laws) to facilitate private investment. In addition, and in the context of technical assistance in the preparation of or related to loans, the World Bank and the regional development banks frequently finance consultant missions on petroleum and mineral policy, legislation and institutional questions.

59. Within the United Nations system, the United Nations Centre on Transnational Corporations is the focal point for all matters relating to transnational corporations. One of the principal mandates of the Centre is to provide technical assistance to requesting Governments aimed at strengthening their capability in dealing with the whole range of issues which arise in relationships between the Governments of host countries and transnational corporations in various sectors. The Centre has assisted many Governments and has accumulated considerable knowledge and experience on matters related to the involvement of transnational corporations in the natural resources sector.

60. In this context, the Centre has provided advisory and training services related to formulating or reviewing national petroleum and mining policies, laws and regulations; assessing the merits of alternative forms of contractual arrangements, taking into account national objectives and resources; formulating or reviewing bidding arrangements and procedures; drafting or reviewing model contracts and undertaking related economic and operational aspects of specific proposed contractual arrangements with transnational corporations; evaluating bids received from transnational corporations in the context of specific projects; preparing for negotiation with transnational corporations, including the formulation of negotiating positions and strategies; and formulating or reviewing legislative, institutional and other arrangements related to the establishment, functions and operation of State-owned entities involved in the natural resources sector.

61. A significant aspect of the Centre's activities in this regard is the collection and analysis of information on legal and contractual arrangements between transnational corporations and host country institutions and enterprises. The Centre maintains a fairly large collection of contracts and agreements of various types and for different sectors as part of its information system on transnational corporations and, with regard to the natural resources sector in particular, has undertaken analyses of contractual arrangements in various areas. These analyses pertain to the principal provisions incorporated in contracts and agreements of various types which highlight the major issues for negotiations between transnational corporations and host country entities.

62. Negotiating investment agreements with transnational corporations in the natural resources sector is a highly technical and sophisticated process. The provision of the Centre's advisory services in legal, economic, financial and technical expertise to negotiate effectively has brought substantial benefits for many developing countries. A recent example is a West African country which in 1989 raised annual earnings from less than $3 million to around $10 million in the renegotiation of minerals contracts.

63. Although operationally small with about 60 Professional staff members, the Centre has carried out a full agenda of research and technical assistance since its establishment in 1975: more than 500 studies and more than 650 projects. Upwards of 6,000 national decision-makers have been trained. The projects alone have generated some $20 billion of foreign investment in developing countries. As a result, the Centre is currently the single largest source of policy-oriented research on transnational corporations and conducts the single largest technical cooperation programme on transnational corporations.

64. Mobilizing investment capital and environmental protection issues dominate current policy debates on petroleum and mineral development. Many countries are likely to require considerable information, advisory services and training to develop suitable policies which would ensure faster economic development and adherence to the principle of permanent sovereignty over natural resources.